Supreme Court, U.S.
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No. 09-598

IN THE

Supreme Court of the United States

DONALD H. MACDERMID, individually and as Administrator of the Estate of Nina Kay MacDermid,

Petitioner,

v.

DISCOVER FINANCIAL SERVICES, d/b/a DISCOVER CHARGE CARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Morgan Stanley is the ultimate parent of Respondent Discover Financial Services LLC, now known as DFS Services LLC. No other publicly held company owns 10% or more of the stock of the Respondent.

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT ..	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iii
I. STATEMENT OF THE CASE	1
A. The Petition Fails to Address the Criteria Set Forth in Rule 10	1
B. The Petition Erroneously Represents Certain Key Facts	3
II. RESPONSE TO PETITIONER'S QUESTIONS PRESENTED FOR REVIEW	4
A. Limitations on the Conduct of a Credit Card Collection Representative	5
B. Subsequent Review by a Court of Appeals Panel	5
C. Limitations on Threatening Words Used in the Collection of Credit Card Accounts	7
III. CONCLUSION	8

TABLE OF CITED AUTHORITIES

Page

Case:

Hyatt v. People, 188 U.S. 691, 23 S. Ct. 456, 47 L. Ed. 657 (1903) 5

Rules:

Sup. Ct. R. 10 ..... 1, 2

Federal Rule of Civil Procedure 12(b)(6) 6, 7

Federal Rule of Civil Procedure 56 ..... 6, 7

I. STATEMENT OF THE CASE

Pursuant to Rule 15 of the Supreme Court Rules, Respondent Discover Financial Services LLC ("Discover") submits this Response in Opposition to the Petition for Writ of Certiorari (the "Petition") filed by Petitioner Donald H. MacDermid, Individually and as Administrator of the Estate of Nina Kay MacDermid. There is no basis for granting the Petition, and it should be denied.

A. The Petition Fails to Address the Criteria Set Forth in Rule 10

The Petition is fundamentally flawed in that Petitioner fails even to set forth, much less attempt to rely upon, any of the considerations governing review on writ of certiorari provided in Rule 10 of the Supreme Court Rules. As that Rule notes, "[R]eview on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Rule 10 then sets forth three factors meant to "indicate the character of the reasons the Court considers . . ." *Id.* Those three factors are:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial

> proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Id.

In the Petition, Petitioner fails to cite or rely upon any of the factors set forth in Rule 10. Here, there is no conflict between the federal circuits or between state and federal courts, no federal question or federal law at issue, and no need for the exercise of this Court's supervisory power over a lower court. At best, the errors Petitioner asserts consist of "erroneous factual findings or the misapplication of a properly stated rule of law," which are alleged errors that this Court rarely decides to review. *Id.* Because none of the factors set forth in Rule 10 are applicable here, this Court should deny the Petition.

B. The Petition Erroneously Represents Certain Key Facts

While, as noted above, this Court rarely seeks to correct erroneous factual findings via discretionary review, many of the alleged errors of which Petitioner complains are not in fact errors at all. Rather, the Petition itself erroneously represents certain key facts in this matter. For example, in the fourth paragraph on page *i* the Petition states: "Mrs. MacDermid applied in her husband's name, as a co-obligor, but stated no false facts." This statement is incorrect in that Mrs. MacDermid did not apply as a co-obligor, and did state false facts.

As the United States Court of Appeals for the Sixth Circuit noted in its opinion, it was a violation of the terms of Discover's online credit card application to "request issuance of a Discover credit card in a party's name without that party's consent or knowledge." [Appendix A, p. 2a]. In each of the three applications for credit cards submitted by Nina Kay MacDermid, she listed her husband, Petitioner, as the "Primary Applicant" and listed herself as an "Authorized Buyer." [*Id.*]. As a result, all three credit cards were established as individual accounts in Mr. MacDermid's name rather than as joint accounts belonging to both Mr. and Mrs. MacDermid. [*Id.*]. Moreover, Mr. MacDermid conceded that he did not apply for the credit cards, and that the applications submitted to Discover were made without his knowledge or permission. [*Id.*]. Petitioner's statement that Mr. and Mrs. MacDermid were "co-obligors" on the Discover credit card accounts is thus incorrect - Mr. MacDermid was the only account holder, and Mrs. MacDermid was

listed merely as an authorized buyer. Further, Petitioner's statement that there were no false facts set forth in the application is incorrect. The terms of use of the Discover website, not surprisingly, prohibit applications submitted without a party's consent and knowledge. The Petitioner acknowledged below that he did not apply for the credit cards issued in his name and was not aware of the applications. Indeed, the applications in issue are the very embodiment of a false statement of fact as they were submitted without the alleged applicant's knowledge, and were therefore fraudulent.

In addition, Petitioner makes other statements that are unsupported by the record in this case. For example, Petitioner states that, "[D]iscover intensified a campaign of harassment and threats, which included repeated threats of criminal prosecution and jail, if the bill was not paid." [Petition, p. 7]. Calling the collection efforts which occurred "a campaign of harassment and threats" is rank hyperbole intended to cast Petitioner's case in a light not supported by the record.

II. RESPONSE TO PETITIONER'S QUESTIONS PRESENTED FOR REVIEW

Petitioner appears to present three questions for the Court's review on page *i* of his Petition. However, those questions do not relate to the legal or factual issues decided below, but rather appear to be purported policy arguments which Petitioner attempts to link to the current economic climate. While Respondent believes that Petitioner has chosen the wrong forum (and indeed, the wrong branch of government) in which to

advance such arguments, Respondent will briefly address each question along with an explanation of why the question is inappropriate for this Court's review.

A. Limitations on the Conduct of a Credit Card Collection Representative

Petitioner relies upon the case of *Hyatt v. People*, 188 U.S. 691, 23 S. Ct. 456, 47 L. Ed. 657 (1903), and the "nation's current economic climate" in an attempt to cast the Petition as one involving broadly applicable principles of debtor/creditor law. This argument fails to acknowledge that the only claim at issue below was a single common law claim for outrageous conduct (a/k/a intentional infliction of emotional distress) under Tennessee law. Further, this case involves an allegedly mentally ill woman who committed suicide, leaving behind a note that did *not* mention Discover, credit cards, collection efforts, threats of jail, or fear of incarceration. [Appendix A., p. 4a].

Petitioner argues that the decisions below, when evaluated in the context of *Hyatt*, leave the law "unsettled." This is incorrect, because the facts of this matter are unique and fundamentally different than those present in *Hyatt* or in the context of general debtor/creditor law. As a result, the question is inappropriate for this Court's review.

B. Subsequent Review by a Court of Appeals Panel

The second question presented for review, i.e., whether *stare decisis* prohibits a subsequent appellate

panel from disregarding a prior decision in the same case, implies that the Court of Appeals made inconsistent findings in the two separate appeals of this case to that Court and that *stare decisis* barred the second decision issued August 18, 2009. This argument ignores the fact that in the first Court of Appeals decision, the Court found only that it could not agree with "dismissal of the outrageous conduct claim at the 12(b)(6) stage," but agreed that "Tennessee's outrageous conduct standard, as in many states, is a formidable one." [Appendix C., p. 50a and 57a]. The second decision of the Court of Appeals, which affirmed the grant of summary judgment to Respondent, is not contrary to the first decision because the undisputed facts had been developed at that stage and the Court of Appeals concluded on the basis of those facts that "Discover's legitimate threats of criminal prosecution against [Mrs. MacDermid] during debt collection failed to constitute outrageous conduct as a matter of law." [Appendix A, p. 26a].

Petitioner is apparently arguing that, because the Court of Appeals once found that Discover did not meet the Federal Rule of Civil Procedure 12(b)(6) standard for dismissal of a claim, Discover could *never* develop undisputed facts sufficient to allow it to prevail on a Motion for Summary Judgment pursuant to Rule 56. Petitioner's argument in this regard is without merit. In response to the original Court of Appeals decision, Discover developed additional facts through the discovery process and subsequently moved on the basis of such facts for summary judgment on the remaining claim of outrageous conduct. The District Court granted Discover's Motion for Summary Judgment. On appeal from the District Court's denial of Petitioner's Motion

to Alter or Amend the Order granting Discover's Motion for Summary Judgment, the Court of Appeals considered the undisputed facts and the summary judgment standard and affirmed the District Court's decision to deny Petitioner's Motion to Alter or Amend. [Appendix A, p. 27a]. The law of *stare decisis* is simply not implicated in this case because the prior decision of the Court of Appeals addressing a Rule 12(b)(6) motion to dismiss was not relevant to or binding on the subsequent panel examining a different record under the Rule 56 summary judgment standard. Consequently, this Court should not grant review of this question.

C. Limitations on Threatening Words Used in the Collection of Credit Card Accounts

Just as with Petitioner's first question for review (which appears not to differ from this question), Petitioner argues that "limitations" should be imposed on threatening criminal prosecution in collection of a debt. Respondent submits that these limitations already exist, and the limitations and exceptions to such limitations were acknowledged and discussed in some detail by the courts below. As to the precise conduct at issue here, i.e., whether a creditor can threaten to pursue criminal prosection, the courts below both held that a creditor can be justified in threatening criminal prosecution if a crime has indeed been committed. [Appendix A, p. 26a]. The District Court and Court of Appeals both applied the undisputed facts to the applicable Tennessee criminal statutes and found that probable cause existed to prosecute Mrs. MacDermid under the applicable Tennessee criminal statutes. As a

result, the Court of Appeals found that any alleged threats of criminal prosecution of Mrs. MacDermid were legitimate and failed to constitute outrageous conduct as a matter of law. [Appendix A., p. 26a]. Discover respectfully submits that this Court should not grant review of this question.

III. CONCLUSION

Respondent Discover Financial Services LLC respectfully submits that this Court should deny the Petition for Certiorari because the Petition fails to demonstrate any reason for further review of the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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